Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

W.R. Huff Asset Management Co., L.L.C.,
Petitioner,

v.

BT Securities Corporation, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether jurisdiction to adjudicate cases pursuant to the Securities Litigation Uniform Standards Act (15 U.S.C. §§ 77p and 78bb(f); "SLUSA") lies exclusively in the federal courts.

2. Whether, despite a split among the federal circuits concerning the appealability of remand orders under SLUSA, state court dismissal of an action under SLUSA is permissible when made after a federal court remand in the same case based on 28 U.S.C. § 1447(d).

3. Whether SLUSA, which eliminates previously available state law claims and shortens applicable statutes of limitations, may be applied retroactively to a case filed after SLUSA's enactment which relates solely to conduct occurring prior to enactment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to BT Securities Corporation, the Respondents are Chase Manhattan Corporation, Inc., Salomon Brothers, Inc., Deloitte & Touche, LLP, and Arthur Andersen, LLP.

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent corporation and no publicly-held company owns 10% or more of Petitioner's stock.

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W.R. Huff Asset Management Co., L.L.C.,
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BT Securities Corporation, et al.,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner W.R. Huff Asset Management Co., L.L.C. ("Huff") respectfully petitions for a Writ of Certiorari to review the decision of the Alabama Supreme Court dismissing Huff's complaint pursuant to SLUSA.

OPINIONS BELOW

The opinion of the Alabama Supreme Court is set forth in *B.T. Securities Corporation, et al. v. W.R. Huff Asset Management Co., L.L.C.*, ___ So. 2d _____, 2004 WL 818852 (Ala.) and is attached as Appendix A. The first unpublished memorandum opinion of the United States District Court for the Northern District of Alabama is attached as Appendix C. The first unpublished decision of the United States Court of Appeals for the Eleventh Circuit denying Huff's permission to appeal pursuant to 28 U.S.C.

§ 1292(b) is attached as Appendix D. The second decision of the United States District Court for the Northern District of Alabama, holding that SLUSA does not apply to Huff's case, and remanding the case to the Alabama state court, is reported in *W.R. Huff Asset Management Co., L.L.C. v. B.T. Securities Corporation*, 190 F. Supp. 2d 1273 (N.D. Ala. 2001), and is attached as Appendix E. The Eleventh Circuit's second unpublished decision, dismissing Respondents' appeal for lack of jurisdiction (no exception to 28 U.S.C. § 1447(d) shown), is attached as Appendix F. The unpublished decision of the Circuit Court of Jefferson County, Alabama, denying Respondents' motion to dismiss Huff's remanded case is attached as Appendix G.

JURISDICTION

The decision of the Alabama Supreme Court dismissing Huff's state court action was entered on April 16, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

1. 15 U.S.C. § 77v, deleting the concurrent jurisdiction provision of the Securities Act of 1933, and 15 U.S.C. § 77p (the SLUSA amendments to the Securities Act of 1933) are attached as Appendix H.

2. The text of SLUSA, Pub.L. No. 105-353, 112 Stat. 3227 (1998) is attached as Appendix I.

3. 28 U.S.C. § 1447(c), (d), portions of "Procedure After Removal Generally," are attached as Appendix J.

STATEMENT OF THE CASE

On April 28, 2000, Huff filed its complaint against Respondents in Alabama state court. The complaint alleges that Respondents violated Alabama law by misleading Huff and its advisory clients into making investments in certain 10½% senior subordinated notes (the "Notes"). The Notes had been issued by Bruno's, Inc. ("Bruno's") on August 10, 1995, in connection with the acquisition and takeover of Bruno's by Kohlberg Kravis Roberts & Co., LP ("KKR").[1] Huff began purchasing the Notes in the secondary trading markets in November 1995, three months after the public offering of the Notes on August 10, 1995. Huff's Complaint was predicated entirely on Alabama state law claims. As the U.S. District Court noted, Huff "carefully avoided the slightest hint of reliance upon federal law."[2] *W.R.*

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[1] KKR and others are named as defendants in a related action now pending in the United States District Court for the Northern District of Alabama. KKR is not a party to this proceeding.

[2] Huff's state law claims are for fraudulent suppression (Ala. Code §§ 6-5-100 & 102); fraudulent and reckless misrepresentation (Ala. Code §§ 6-5-100 & 101); fraudulent and reckless deceit (Ala. Code §§ 6-5-103 & 104); violation of the Alabama Securities Act (Ala. Code § 8-6-17); negligent misrepresentation; negligent misrepresentation of financial information; and civil conspiracy.

Huff Asset Management Co., LLC v. BT Securities Corp., 190 F. Supp. 2d 1273, 1274 (N.D. Ala. 2001) (Appendix E).

On June 13, 2000, Respondents removed Huff's case to the United States District Court for the Northern District of Alabama. Respondents noted that the removal was justified under SLUSA, which provides for exclusive federal jurisdiction through its removal provisions. 15 U.S.C. §§ 77p and 78bb(f) (Appendices H, I). Respondents' position was that, although the complaint alleged Alabama claims only, it nevertheless involved a "covered class action" and a "covered security" within the meaning of SLUSA. Respondents recognized in their Notice of Removal that SLUSA provides for "exclusive jurisdiction in federal court for such allegations." They added that "[t]his Court [the federal district court] has subject matter jurisdiction of this action and this action is properly removable to this Court pursuant to the [removal provisions of SLUSA]." (Notice of Removal, ¶10, Appendix B).

Upon removal, Respondents promptly moved to dismiss Huff's case, arguing that it was preempted by SLUSA. At the same time, Huff moved to remand on the ground that SLUSA did not apply to its Alabama claims. On August 17, 2000, the district court entered an order denying Huff's motion to remand, but also allowed Huff to seek guidance from the Eleventh Circuit Court of Appeals by certifying the SLUSA preemption issue for interlocutory appeal. (Memorandum Opinion, August 17, 2000, Appendix C).

The Eleventh Circuit declined to hear the appeal. (Appendix D). Huff then moved for reconsideration of the district court's prior order denying Huff's remand motion, in light of then recent authority of the Ninth Circuit Court of Appeals, holding that the Private Securities Litigation Reform Act of 1995 ("PSLRA") did not apply retroactively. *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2002). The district court analyzed the principles of retroactive application, as articulated by this Court and as applied by the Ninth Circuit to the PSLRA and concluded that SLUSA could not be applied retroactively to Huff's case because the alleged misconduct occurred and was completed prior to November 3, 1998, the date of SLUSA's enactment. (Appendix E).

The district court then remanded the case to the Alabama state court on May 22, 2001. (Appendix E). The district court's remand was grounded on a lack of subject matter jurisdiction: "Because the court now finds that SLUSA does not apply because the Act does not apply retroactively, this Court cannot do anything except to remand the case." (190 F. Supp. 2d at 1275; *see also* "Order of Remand," Appendix E, at 64a, where the court noted it lacked subject matter jurisdiction.)

Now, Respondents sought to appeal the district court's remand order. After briefing and oral argument, though, the Eleventh Circuit issued a *per curiam* order stating: "Dismiss for lack of jurisdiction, no exception to 28 U.S.C. § 1447(d) having been shown." (Appendix F).

Despite the district court's conclusion that there was no subject matter jurisdiction to dismiss the case under SLUSA, Respondents next moved in the Alabama state court to dismiss Huff's remanded case under SLUSA. But that court denied Respondents' motion to dismiss on March 31, 2003. (Appendix G). Respondents then filed an interlocutory appeal to the Alabama Supreme Court, which allowed the appeal and took briefing on the jurisdictional and retroactivity issues.[3] The Alabama Supreme Court issued its opinion on April 16, 2004. Treating only the retroactivity issue, and ignoring the jurisdictional issues, the Court dismissed Huff's case under SLUSA. (Appendix A).

REASONS FOR GRANTING THE WRIT

This Petition poses three issues that go to the very heart of the dual federal-state system of securities regulation that has prevailed in this country for seventy years and, even more fundamentally, to the allocation of power between federal and state courts which underlies our federal system.

In the following three sections of this Petition, Huff shows that the decision of the Alabama Supreme Court not only conflicts with the express intent of Congress that the federal

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[3] Although the Alabama Supreme Court declined to hear argument, Huff had carefully preserved below the issues of exclusive jurisdiction, the finality of the district court's remand order under 28 U.S.C. § 1447(d) and retroacivity in its briefs as Appellee, dated May 13 and August 21, 2003, and filed in the Alabama Supreme Court.

courts alone are empowered to dismiss cases under SLUSA, it also clashes with the decisions of several federal courts of appeal that the federal courts represent the exclusive venue for actions governed by SLUSA.

There is also a split among the circuits concerning the appealability of remand orders issued under SLUSA. The Alabama Supreme Court's dismissal of Huff's case deepens this division because it was made in the face of a prior federal court ruling that Huff's case could not be dismissed because SLUSA does not apply – that is, that there was no subject matter jurisdiction under SLUSA. Thus, the Alabama decision undermines the policy of finality upon which the rule of non-appealability of remand orders is founded.

Finally, the Alabama Supreme Court disregarded this Court's teachings concerning the retroactive application of federal statues. By dismissing Huff's case under SLUSA when it had no power to do so, and when a federal court had already determined that Huff's case could not be so dismissed, the Alabama Supreme Court deprived Huff of substantive rights which it possessed under state law.

I. THE DECISION OF THE ALABAMA SUPREME COURT UNDERMINES CONGRESS' INTENT TO REALLOCATE FEDERAL-STATE COURT POWER OVER PRIVATE SECURITIES LITIGATION AND CONFLICTS WITH FEDERAL APPELLATE COURT DECISIONS THAT SLUSA IS A STATUTE OF EXCLUSIVE FEDERAL COURT JURISDICTION.

It has been widely recognized that the 1990s were characterized by renewed attention to principles of federalism and the delegation of governmental authority to the states.[4] However, in one area – the regulation of securities and private securities litigation – the trend has been decidedly in the opposite direction. In the early 1990s, Congress became concerned that "the current system of private liability under the federal securities laws d[id] not adequately distinguish between meritorious and frivolous claims." (Perino, "Fraud and Federalism," *supra*, at 290). There was indeed a perception that there was simply too much securities litigation. The result was the Private Securities Litigation Reform Act of 1995 ("PSLRA", Pub. L. No. 104-67, 109

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[4] *See* Perino, "Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action," 50 *Stan. L. Rev.* 273, 274 (1998); Levy & McAllister, "Defining the Roles of the National and State Governments in the American Federal System: A Symposium," 45 *U. Kan. L. Rev.* 971, 972-73 (1997) ("In the past few years, federalism has re-emerged as a focal point of debate in the halls of Congress, the offices of the White House, and the chambers of the Supreme Court.").

Stat. 737 (1995), codified in scattered sections of 15 U.S.C.).

The reforms embodied in the PSLRA are primarily procedural; they make it more difficult to bring and maintain a class action in federal court. Among the most important procedural reforms are (i) a heightened pleading standard; (ii) a discovery stay; and (iii) a safe harbor for forward-looking information.[5]

Further Congressional involvement in the securities field occurred on the heels of the passage of the PSLRA with the 1996 enactment of the National Securities Markets Improvement Act ("NSMIA").[6] The NSMIA was designed to "modernize and rationalize ... the respective responsibilities of the Federal and State governmental authorities over the securities markets." (H.R. Rep. No. 104-622, at 16 (1996)). Just as the PSLRA was designed to restructure private securities litigation, so too was the NSMIA calculated to alter the traditional dual state-federal regulatory structure, applying federal regulation to securities that were "inherently national in nature," and consigning "[s]maller, regional intrastate offerings" to state regulation. (Perino, "Fraud and Federalism," *supra*, at 329).

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[5] These may be found, respectively, at 15 U.S.C. § 78u-4(b) (heightened pleading standard); 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)(B) (discovery stay); and 15 U.S.C. §§ 77z-2(c), 78u-5(c) (safe harbor).

[6] Pub. L. No. 104-290, 110 Stat. 3416 (1996). The NSMIA is codified in scattered sections of 15 U.S.C.

No sooner was the PSLRA enacted in 1995 than the Act came under intense scholarly and institutional study; in 1996 and 1997, at least four studies were prepared discussing the effects of the Act.[7] Despite differences in analysis and methodology, all four reports concluded first, that there was no evidence that the PSLRA had caused a significant decline in the volume of class action litigation and second, that a significant portion of the litigation had shifted from federal to state court. (Perino, "Fraud and Federalism," *supra*, at 299-302).

These reports were discussed in Congress beginning in the fall of 1997. Legislators were particularly troubled by the SEC report which "called the shift of securities fraud cases from federal to state court 'potentially the most significant development in securities litigation' since the passage of the Reform Act." (H.R. Rep. No. 105-640, at 10 (1998)). It was apparent to

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[7] Grundfest & Perino, "Securities Litigation Reform: The First Year's Experience," (John M. Olin Program in Law and Economics, Stanford Law School, Working Paper No. 140, February 1997); Martin, Juneja, Foster & Dunbar, "Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?" (National Economic Research Associates, November 1996); Office of the General Counsel, SEC, "Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995," (April 1997); and Letter to the Hon. Michael G. Oxley and the Hon. Thomas J. Manton from Daniel V. Dooley, Partner, Price Waterhouse LLP, regarding the Price Waterhouse LLP Securities Litigation Study and Addendum on State "Parallel" and State "Federal-Equivalent" Securities Litigation Cases (June 2, 1998) discussed in H.R. Rep. No. 105-640, at 11 (1998).

Congress that "the migration to State court was fueled by a desire to circumvent the more stringent requirements of the heightened pleading standard adopted under the Reform Act." H.R. Rep. No. 105-640, at 10-11; *see also* H.R. Conf. Rep. No. 105-803 (1998), at 14-15; *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-108 (2d Cir. 2001); *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 232 (D.N.J. 2000), and *In re Lutheran Brotherhood Variable Ins. Prod. Co. Sales Practices Litigation*, 105 F. Supp. 2d 1037, 1039 (D. Minn. 2000).

As a result of hearings held in 1997 and 1998, Congress enacted SLUSA. There is no doubt that the enactment of SLUSA arose from a belief that preemption was needed to ensure the effectiveness of the PSLRA. Congress would have enacted PSLRA in vain if plaintiffs could simply evade the higher pleading standard, the discovery stay, and other procedural provisions by filing in state rather than federal court. No less important, advocates of preemption argued that the securities most affected by class action litigation were securities traded on national markets. Making such securities subject to inconsistent rules emanating from different jurisdictions would make little sense. Indeed, the NSMIA had preempted most state regulations involving securities offerings to create a single set of federal rules governing the offering of nationally traded securities. That same uniformity, it was argued, should apply to causes of action involving those same nationally traded securities. *See* Michael A. Perino, *Securities Litigation After the Reform Act*, § 11.02 (CCH, 2004).

In the findings which prompted the enactment of SLUSA, reflected in Section 2 of the Act, Congress concluded that "since enactment of [PSLRA], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from federal to state courts." "[T]his shift has prevented [PSLRA] from fully achieving its objectives." Therefore, Congress concluded, "in order to prevent certain state private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, ..." (Pub. L. No. 105-353, §§ 2(2), (3), (5), Appendix I.)

In order to achieve the goal of enacting "national standards for securities class action lawsuits" – in order to achieve uniformity – Congress determined that all securities actions meeting the definitional parameters of SLUSA must be adjudicated in the federal courts. Although three separate bills were considered by Congress, the author of one of the bills, Michael Perino, noted that "[a]ll three bills eliminate[d] concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts." (Perino, "Fraud and Federalism," *supra*, at 335).[8]

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[8] The factors underlying the creation of exclusive federal court jurisdiction in SLUSA are the same as those identified by this Court in an exclusive federal jurisdiction case: "[T]he desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater

Congress achieved its purpose of making federal court the exclusive venue for certain state court class action securities cases in two ways.

First, it provided for mandatory removal:

> "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)."

(15 U.S.C. § 77p(c), Appendix H.)

Second, Congress expressly deleted the concurrent jurisdiction provision from the 1933 Securities Act. The 1933 Act, as amended by SLUSA, now provides:

> "The district courts of the United States ... shall have jurisdiction of offenses and violations under this subchapter ... and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."

(15 U.S.C. § 77v(a), Appendix H; italicized portions added by SLUSA.)

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hospitality of federal courts to peculiarly federal claims." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84 (1981); *see also* Perino, "Fraud and Federalism," *supra*, at 336.

And, to underscore this point, Congress added in the same provision:

> "*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Section 77p(c), referenced in the above two quoted provisions, embodies the mandatory removal provision first quoted above. It is clear then, that the 1933 Act was amended to provide for exclusive federal court jurisdiction of cases coming within the scope of SLUSA. [9]

This Court has exhibited a disinclination to deprive state courts of jurisdiction over federal claims: "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. at 478. However, Congress "may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction

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[9] There was no need to provide for removal to federal court of actions brought under the Securities Exchange Act of 1934. Such actions have always been subject to exclusive federal court jurisdiction. *See* 15 U.S.C. § 78aa.

and federal interests." *Id.; see also Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) ("This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim"); *and Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) ("To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in its exercise of powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.").

With the enactment of SLUSA, Congress has done just that. First, it expressly stated that cases coming within its scope "shall be removable" to federal court. Second, Congress qualified the concurrent jurisdiction provision of the 1933 Securities Act by making cases coming within the ambit of SLUSA subject to federal jurisdiction and subject to the mandatory removal provision of SLUSA. In order to fulfill the policy goal of uniformity which animated both PSLRA and SLUSA, Congress vested the federal courts with exclusive jurisdiction to make determinations under SLUSA. Federal courts that have interpreted SLUSA have reached precisely this conclusion. *See Spielman v. Merrill Lynch*, 332 F.3d 116, 123-125 (2d Cir. 2003); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 595 (8th Cir. 2002); *Riley v. Merrill Lynch*, 292 F.3d 1334, 1341 (11th Cir. 2002); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1091-92 (11th Cir. 2002), *cert. denied*, 539 U.S. 927 (2003); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d at 108; *In re Worldcom,*

Inc. Securities Litigation, 293 B.R. 308, 326 (S.D.N.Y. 2003); and *Burns v. Prudential Securities, Inc.*, 218 F. Supp. 2d 911, 914 (N.D. Ohio 2002).

By deciding to dismiss Huff's case under SLUSA, the Alabama Supreme Court ran afoul not only of the express Congressional policy mandating uniform federal court interpretation of SLUSA, but also of the numerous federal courts which have concluded that determinations under SLUSA may be made only by the federal courts. The decision of the Alabama court is all the more important because it issued from the Supreme Court of the state; other state courts are likely to follow the Alabama lead, thus defeating Congressional intent and placing them in conflict with federal decisional law.

II. BECAUSE THE DISTRICT COURT REMANDED HUFF'S CASE ON THE BASIS OF A LACK OF SUBJECT MATTER JURISDICTION UNDER SLUSA, THE ALABAMA SUPREME COURT'S DECISION DISMISSING HUFF'S CASE UNDER SLUSA UNDERMINES THE POLICY OF FINALITY WHICH UNDERLIES 28 U.S.C. § 1447(d).

Nearly thirty years ago, this Court confirmed that "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336,

351, (1976). This Court was equally clear on the policy underlying the non-appealability of remand orders issued under Section 1447(c); the rule was designed "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, ... " (*Id.*)

The Court underscored the non-appealability principle in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). There, the Court held that whether removal was achieved pursuant to the general federal removal statute, 28 U.S.C. § 1447, or pursuant to a particular removal statute, such as the bankruptcy removal statute, the order of removal was still not appealable if based upon a defect in the removal procedure or on a lack of subject matter jurisdiction. (516 U.S. at 128).

In the present case, as noted, the district court found that because "SLUSA does not apply because the Act does not apply retroactively, this Court cannot do anything except to remand the case." (190 F. Supp. 2d at 1275, Appendix E). And, in its remand order, the district court specifically referenced 28 U.S.C. § 1447(c) and found that it "lacks subject matter jurisdiction." (Appendix E, at 64a). In short, the district court based its decision to remand Huff's case on its conclusion that SLUSA could not be applied retroactively to Huff. Absent SLUSA jurisdiction, there was no subject matter jurisdiction. (Order of Remand, Appendix E, at 64a). Therefore, in accordance with 28 U.S.C. § 1447(c), the district court remanded the case to state court.

This Court has ruled that "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 712 (1996). There is no question that the district court's remand order in the present case was based on a lack of subject matter jurisdiction. Therefore, the Eleventh Circuit Court of Appeals was correct in declining to consider Respondents' appeal from that order: "Dismiss for lack of jurisdiction, no exception to 28 U.S.C. § 1447(d) having been shown." (Appendix F).

But the Eleventh Circuit's dismissal of Respondents' appeal by no means reflects unanimity among the circuits concerning the appealability of SLUSA remand orders. The Second Circuit has held that remand orders "based on a finding that the state law claim evades SLUSA" are not reviewable. *Spielman*, 332 F.3d at 127. The Ninth Circuit has concluded the same. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 965-67 (9th Cir. 2004); *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1117-19 (9th Cir. 2002). However, the Seventh Circuit – while recognizing it was splitting from the other circuits – has ruled that SLUSA remand decisions *are* reviewable. *Kircher v. Putman Funds Trust*, ___ F.3d ___, 2004 WL 1470350, *3-4 (7th Cir. 2004). This Court should intervene to resolve this division, a split that is likely to recur with frequency in the future.

Quite apart from the split among the circuits, the question remains whether, after

remand, the *state court* possessed the power to dismiss Huff's case under SLUSA. It is clear that the Respondents moved to dismiss Huff's remanded case solely on the basis of SLUSA. As the Alabama state trial court noted, "Defendants then, on January 24, 2003 filed the present motion to dismiss Plaintiffs' complaint based upon the preemption by the Securities Litigation Uniform Standards Act of 1998 ... ." (Order of March 31, 2003, Appendix G, at 67a).

The Alabama trial court concluded that the federal district court's determination regarding the retroactive application of SLUSA represented the law of the case and should be adhered to (*Id.*) And, the trial court reasoned that the district court was, in any event, correct in its determination that SLUSA could not be retroactively applied to Huff's case (Appendix G, at 79a-87a).

The Alabama Supreme Court ignored the finality principle underlying 28 U.S.C. § 1447(d). The court held that "SLUSA applies to and preempts Huff's claims." (Appendix A, at 13a).[10]

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[10] The Alabama Supreme Court did not even address the jurisdictional issues central to this Petition. Despite the district court's determination that there was a lack of subject matter jurisdiction under SLUSA, the Alabama Supreme Court concluded only that it was not bound by the district court's remand decision. The Court cited to *In re Loudermilch*, 158 F.3d 1143, 1146 (11th Cir. 1998), in support of its conclusion that a federal remand decision has no preclusive effect on a state court's resolution of a preemption defense in the same case. However, the Supreme Court did not consider that *Loudermilch* was a

Section 1447(c) and (d) provide that a remand order based on a lack of subject matter jurisdiction is "not reviewable on appeal or otherwise." Certainly, Respondents' motion in the Alabama trial court to dismiss Huff's remanded case on the basis of SLUSA, and its re-urging of that dismissal in the Alabama Supreme Court, did not represent a direct "appeal" of the district court's remand order. Nevertheless, under this Court's teachings in *Thermtron*, *Things Remembered*, and *Quackenbush*, the district court's remand could not be challenged in any fashion, "by appeal or otherwise." To allow such a challenge, even a challenge through the state courts as advanced by Respondents here, would be to defeat the policy of finality which underlies the rule of non-appealability adopted by Congress.

In addition, the clear intent of Congress in mandating removal of actions claimed to be subject to SLUSA was that federal courts alone should make the determination as to SLUSA's applicability. A finding that the statute is not applicable means that there is no subject matter jurisdiction under SLUSA. The Alabama Supreme Court's decision that Huff's case should be dismissed under the authority of SLUSA thus

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case brought under the ERISA statute, a statute that *expressly* provides for concurrent federal and state court jurisdiction. (29 U.S.C. § 1132(e)(1).) In contrast, as shown above in Section I, SLUSA determinations are within the exclusive purview of the federal courts. Therefore, the Alabama Supreme Court was wrong to disregard the federal district court's determination that SLUSA could not be applied retroactively to Huff's case.

represented an effective reversal of the federal court's determination. The Supreme Court's ruling violates the letter, the spirit and the policies underlying SLUSA, the SLUSA removal provision, and the federal remand statute.

III. THE ALABAMA SUPREME COURT'S RETROACTIVE APPLICATION OF SLUSA TO CONDUCT OCCURRING PRIOR TO ITS ENACTMENT CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT.

Taken together, PSLRA, NSMIA and SLUSA represent a dramatic curtailment of state rights and the rights of private litigants in the securities field.[11] However, there is no indication in the language of SLUSA, or in the legislative history, that Congress intended that the provisions of SLUSA reach back to bar state court actions treating conduct occurring before the statute's enactment, November 3, 1998. Yet, the Alabama Supreme Court's decision that SLUSA applies retroactively to Huff's state law claims has the effect of eliminating claims that were available to Huff prior to SLUSA's enactment. In so doing, the Alabama court's decision ignores this Court's clear teachings regarding the retroactive application of statutes.

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[11] Consistent with Huff's position regarding the finality of the district court's determination in its remand order that there was no subject matter jurisdiction over Huff's case, it is not necessary for this Court to reach the retroactivity issue. However, should the Court elect to consider the issue, it is clear that the district court was correct – SLUSA does not apply to pre-enactment conduct.

A. SLUSA Does Not Contain An "Express Command" Or An "Unambiguous Directive" That Would Allow Retroactive Application.

SLUSA's applicability clause states: "The amendments made by this section shall not affect or apply to any action commenced both before and pending on the date of enactment of this Act." (Pub. L. No. 105-353, § 101(c), 112 Stat. 3227, 3233 (1998); Appendix I). This language is completely silent regarding cases filed after SLUSA's enactment on November 3, 1998 and cases involving conduct which occurred prior to SLUSA's enactment.

This Court's analysis of retroactivity questions starts with the principle that "[r]etroactivity is not favored in the law," and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).)

Supreme Court jurisprudence, then, posits a two-step approach. Analysis should first be directed to the question whether the statute contains an "express command" or an "unambiguous directive" that the statute is to be applied retroactively. *Lindh v. Muphy*, 521 U.S. 320, 325-326 (1997) (summarizing the principles of the Court's prior decision in *Landgraf*.)

SLUSA's applicability clause contains neither an "express command" nor an "unambiguous directive" mandating retroactive application. In the absence of such clarity, Respondents argued below that SLUSA's applicability clause gives rise to a negative inference; that is, because SLUSA does not apply to actions pending on the date of its enactment, it must therefore apply to all cases filed thereafter, even with respect to conduct that occurred before SLUSA was adopted. This negative inference argument fails because it focuses on the date when Huff's complaint was filed – admittedly after SLUSA's enactment – rather than the date when the relevant conduct occurred. In *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939 (1997), this Court made clear that it is the time of the conduct in question that is crucial in considering retroactive application, not the date the lawsuit was filed.

Equally clear is the principle laid down by this Court in *Landgraf* that a "silent negative inference," of the type advocated by Respondents here, cannot be employed to conclude that a statute should be applied retrospectively. This was precisely the approach taken by the Ninth Circuit in *Scott v. Boos*, 215 F.3d at 947-48, where the court held that the PLSRA -- which contains an applicability clause nearly identical to SLUSA's -- could not be applied retrospectively to conduct occurring before that Act's enactment. Indeed, in *Landgraf*, the Court set forth that type of language which, when used by Congress, indicates an "express command" or an "unambiguous directive" regarding retroactivity.

A statement that an Act "shall apply to all proceedings pending on or commenced after the date of enactment of this Act," provides the level of clarity which this Court requires to make a determination of retroactive application. Such express language, however, does not appear in SLUSA's applicability clause, even though SLUSA was enacted more than four years after *Landgraf* was decided.

This Court provided further clarity concerning the retroactive application of statutes in *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001). The issue in *St. Cyr* was essentially the same as in this case; that is, whether to apply a new statutory amendment to pre-enactment conduct. The I.N.S. made the same negative inference argument advanced by Respondents below. But this Court rejected the negative inference argument because the statutory language did not contain the "express command" required by *Landgraf*. 533 U.S. at 318. Similarly, the applicability clause of SLUSA does not communicate with unmistakable clarity a Congressional intent to apply SLUSA to pre-enactment conduct.[12]

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[12] The Alabama Supreme Court is not alone in mistakenly giving SLUSA retroactive effect. Two circuit courts have done likewise. *Blaz v. Belfer*, 368 F.3d 501 (5th Cir. 2004) and *Professional Mgmt. Assocs. Employees Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1176 (2004). And, a district court in a case related to the present case did the same. *W.R. Huff Asset Mgmt. Co. v. Kohlberg Kravis Roberts & Co.*, 234 F.Supp.2d 1218 (N.D. Ala. 2002).

B. Retroactive Application Of SLUSA Would Impair Huff's Substantive Rights.

While SLUSA contains no express command of retroactive application to pre-enactment conduct, it is equally clear that SLUSA fails the second test in the *Landgraf* analysis: to retroactively apply SLUSA would deprive Huff of substantive rights it possessed during the time it was purchasing the Notes. (*Landgraf*, 511 U.S. at 280). This is apparent first, because SLUSA eliminates all state law causes of action and second, because SLUSA shortens the statutes of limitation applicable to Huff's claims.

Huff invested in the Notes starting in November 1995 and continuing until February 1998, and it had the absolute right to bring an action in Alabama state court asserting claims that had accrued and vested in its favor under Alabama law. SLUSA, enacted on November 3, 1998, after Huff had already invested in the Notes, made § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 the exclusive avenue for claims of fraud involving "covered securities" and "covered class actions." If applicable here, SLUSA would render the § 10(b) claim the exclusive remedy for victims of securities fraud and would extinguish Huff's Alabama claims for negligent or innocent misrepresentation, which are actionable under Alabama law, but not under the federal securities laws. In short, SLUSA has a retroactive effect because it "attaches new legal consequences to an event completed before its enactment." (*Landgraf*, 511 U.S. at 270).

In addition to eliminating causes of action under state law, SLUSA shortens the statute of limitations applicable to Huff. The Section 10(b) and Rule 10b-5 claim available if SLUSA applies is governed by a statute of limitations that requires such claim to be brought within one year of "discovery," with an absolute three year period of repose.[13] Under Alabama law, the fraud and Alabama Securities Act claims would be governed by a limitations period of two years from "discovery" with no absolute period of repose. *See* Ala. Code §§6-2-3 and 8-6-19(f).

In *Hughes Aircraft,* this Court cited with approval *Chenault v. U.S. Postal Service,* 37 F.3d 535 (9th Cir. 1994), where the Ninth Circuit, relying on *Landgraf,* held that a new statute that lengthened a statute of limitations and revived barred claims could not be retroactively applied. Such retroactive application, the Ninth Circuit reasoned, would alter the substantive rights that a party, in that case the defendant, possessed at the time of the conduct at issue.

Adopting a "functional approach," this Court in *Hughes Aircraft* recognized that statutes of limitation, although generally thought of as procedural, involve the substantive rights of the parties because they can effectively extinguish an

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[13] These periods apply to the implied remedy under § 10(b) and Rule 10b-5. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 364 (1991). On July 30, 2002, the Sarbanes-Oxley Act of 2002 extended the limitation periods to two and five years, respectively. 28 U.S.C. § 1658(b).

existing claim or revive a barred claim. Such effect runs afoul of *Landgraf's* teachings that a statute has retroactive effect if it would "attach new legal consequences to events completed before its enactment." 511 U.S. at 270.

SLUSA then effectively impairs the rights Huff possessed during the time of its investment in the Notes by effectively shortening applicable statutes of limitation and eliminating Huff's state law claims.

IV. THE DECISION BELOW REFLECTS WIDESPREAD UNCERTAINTY OVER THE MEANING OF *LANDGRAF* WHICH THIS COURT ALONE CAN DISPEL.

This Court has long held that the traditional labels given a statute do not control when deciding whether a statute applies retroactively. Instead, this Court has adopted a "functional" approach which considers "whether the new provision attaches new legal consequences to events completed before its enactment," and whether a decision made under the law comports with familiar considerations of fair notice, reasonable reliance, and settled expectations." *I.N.S. v. St. Cyr,* 533 U.S. 289. Notwithstanding these guidelines, the Alabama Supreme Court's decision still adhered to the traditional characterization of statutes as substantive, procedural, or jurisdictional, without regard to the true and practical impact of their application. Relying on *Professional Mgmt. Assocs.* (335 F.3d at 803), the Court concluded that, consistent with *Landgraf,* SLUSA is "a

procedural rule" regulating "secondary conduct." (Appendix A, at 13a) While SLUSA does have jurisdictional and procedural attributes, it is also substantive in nature as it extinguishes state law claims and shortens applicable statute of limitations. These aspects of SLUSA did not sway the Alabama Supreme Court or the other courts noted above (*see* note 12) because they had already labeled SLUSA as a mere procedural statute under their interpretation of *Landgraf*.

Despite this Court's teachings in *Landgraf*, several courts have reached opposite conclusions regarding *Landgraf's* meaning and application. This case itself has been decided differently by two separate courts; *i.e.*, the federal district court remanded the case because it determined that SLUSA could not be applied to conduct that predated its enactment, but the Alabama Supreme Court dismissed the case because it determined that SLUSA did apply. Despite *Landgraf*, some courts persist in applying traditional labels and the concept of "secondary conduct" and thus have applied SLUSA retroactively even though it extinguishes claims. *See* note 12, above.

However, other courts have interpreted *Landgraf* to prevent retroactive application of a statute which extinguishes a cause of action. In *Scott v. Boos*, (215 F.3d at 944), the Ninth Circuit held that the PSLRA (which has an applicability clause nearly identical to SLUSA's) could not be applied retroactively to extinguish a RICO claim when the conduct giving rise to such claim occurred prior to the PSLRA's enactment.

Similarly, in *Mathews v. Kidder Peabody & Co., Inc.*, 161 F.3d 156, 165 (3d Cir. 1998), *cert. denied*, 625 U.S. 1067 (1999), the Third Circuit interpreted *Landgraf* as preventing the retroactive application of the PSLRA as it applied to RICO claims. *See also Abrams v. Societe Nationale Des Chemis*, 332 F.3d 173, 186 (2d Cir. 2003). The Alabama Supreme Court's decision here involved SLUSA whereas the decisions in *Scott, Matthews*, and *Abrams* involved other statutes. Still, each case involved the application of *Landgraf* to a statute that effectively extinguishes a claim that had existed prior to its enactment.

Thus, while the Second, Third, and Ninth Circuits have all held that *Landgraf* prevents the retroactive application of statutes which extinguish claims that existed prior to the enactment of such statutes, the Fifth and Eighth Circuits and the Alabama Supreme Court have reached the opposite conclusion concerning *Landgraf's* meaning.

It was not necessary in this case for the Alabama Supreme Court to have considered the retroactivity issue. But, having done so, it failed to apply this Court's teachings in *Landgraf*, *Hughes* and *St. Cyr*. As a result, Huff has lost its vested state law claims. This Court should grant certiorari in this case and rule that SLUSA cannot be applied retroactively.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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